(2)

No. 03-446

Supreme Court, U.S.
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In The Supreme Court of the United States

JOAN CAROL LIPIN,

Petitioner,

v.

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA, LAWRENCE J. BAER, MARK A. JACOBY, CHRISTOPHER A. PARLO, STEVEN R. WALL, AMERICAN NATIONAL RED CROSS, and ARTHUR W. GREIG, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONER'S REPLY

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TABLE OF CONTENTS

Preliminary Statement 1

I. THE NEW YORK ATTORNEY GENERAL HAS WAIVED ANY ELEVENTH AMENDMENT OBJECTION TO THE SUBJECT MATTER JURISDICTION OF THE COURTS BELOW 2

II. THE PETITION IS CERTWORTHY ALSO BECAUSE IT WILL REQUIRE NEW YORK ATTORNEY GENERAL SPITZER TO BREAK HIS SILENCE AND COME FORWARD WITH THE INSIDER INFORMATION THAT HE AND HIS CLIENT UNIQUELY POSSESS ABOUT THE CORRUPTION OF THE JUDICIAL ELECTION PROCESS IN NEW YORK 6

CONCLUSION 9

TABLE OF AUTHORITIES

Cases

Dennis v. Sparks,
449 U.S. 24 (1980) 3

Dubuc v. Michigan Board of Law Examiners, __ F.3d __,
2003 U.S. App. LEXIS 18153
(6th Cir. Sept. 3, 2003) 4

Ex Parte Young,
209 U.S. 123 (1908) 2

Gideon v. Wainwright, Corrections Director,
372 U.S. 335, 9 L.Ed. 2d 799,
83 S.Ct. 792 (1963) 6

Jeffreys v. Dr. Griffin,
2003 N.Y. LEXIS 3409
(Oct. 30, 2003) 5

Nevada Dept. of H.R. v. Hibbs,
__ U.S. __, 155 L.Ed. 2d 953,
123 S.Ct. 1972 (May 27, 2003) 4

Stewart v. Wyoming Cattle Ranch Co.,
128 U.S. 383, 32 L.Ed. 439, 9 S.Ct. 101 (1888) 1

United States v. John Doe,
203 U.S. App. LEXIS 22105
(2d Cir. Oct. 29, 2003) 8

Constitutional and Statutory Provisions

U.S.CONST.amend. I 1, 2, 5, 6

U.S.CONST.amend. XI 2, 3, 4

U.S.CONST.amend XIV,
Section 5 4

28 U.S.C. § 455 8

New York Judiciary Law,
Section 487 3

Other Authorities

Evidence and Witnesses, § 294,
58 *New York Jurisprudence*
2d 56 (2000) 1

Trial Handbook for New York Lawyers
2d § 25:7 1

Miscellaneous

AM New York, Nov. 4, 2003, p. 2 7

PETITIONER'S REPLY

Preliminary Statement

With respect to the certiorari petition filed herein, the response of six of the seven respondents was to file a waiver, and the seventh respondent, National Union Fire Insurance Company of Pittsburgh, PA., defaulted in making any response. An unqualified waiver was filed for respondents Christopher A. Parlo and Steven R. Wall by Morgan, Lewis & Bockius by letter. Four of the respondents stated they waived their right to respond to the petition unless this Court specifically requires them to file a response. The respondents filing such qualified waivers were Arthur W. Greig, whose response was by the New York Attorney General, and the American National Red Cross, Lawrence J. Baer, and Mark A. Jacoby, whose response was by Weil, Gotshal & Manges, despite its disabling conflict of interest in filing such a response for the Red Cross since two of the named respondents are individuals who are lawyers in that same law firm.

Petitioner therefore respectfully submits this Reply to show why the public interest in the questions presented in the certiorari petition is such that the silence of respondents should be treated as a consent to the certworthiness of the petition, in accordance with the general rule applicable to the effect of silence by parties to pleadings such as a certiorari petition, see *Trial Handbook for New York Lawyers* 2d § 25:7, rather than a denial, especially since the First Amendment specifically guarantees the right to file such a petition for a redress of grievances.

See also *Stewart v. Wyoming Cattle Ranch Co.*, 128 U.S. 383, 390, 32 L.Ed. 439, 442, 9 S.Ct. 101 (1888). As stated in Evidence and Witnesses, § 294, 58 *New York Jurisprudence* 2d 56 (2000):

> "As a general rule, where a statement is made, in the presence and hearing of one who since has become a party to an action, in regard to facts affecting his or her rights and he or she makes no reply, such silence may be construed as a tacit admission of the facts stated."

I. THE NEW YORK ATTORNEY GENERAL HAS WAIVED ANY ELEVENTH AMENDMENT OBJECTION TO THE SUBJECT MATTER JURISDICTION OF THE COURTS BELOW

The record below supports petitioner's assertion that New York Attorney General Eliot Spitzer effectively waived respondent Greig's alleged Eleventh Amendment immunity defense by seeking and obtaining a stay on discovery, and participating in the retaliatory punitive action against petitioner by affirmatively acting to cause her to be deprived of her right to be represented by qualified counsel so that petitioner's First Amendment rights could not be prosecuted effectively, and waived any Eleventh Amendment defense by voluntarily and actively participating in the merits of the pretrial litigation by representing respondent Greig on an individual basis.

Moreover, the Eleventh Amendment does not preclude suits against state officials for injunctive relief, even when the remedy will enjoin the implementation of an official state policy. See *Ex Parte Young*, 209 U.S. 123 (1908). Such declaratory and injunctive relief is specifically requested in the complaint filed in this litigation that is verified by petitioner. (Pet.App. 171a-224a).

In addition, with respect to the claim for damages, respondent Greig was sued only in his individual capacity with any monetary liability to be imposed only upon him personally

(or his insurer), not the State of New York or any of its agencies.

By representing respondent Greig on the claims asserted against him individually, therefore, the New York Attorney General waived any Eleventh Amendment claim of immunity.

The claims against respondent Greig are specifically made pursuant to Section 487 of the New York Judiciary Law (Pet.App. 178a-179a, 190a, 224a). Treble damage claims are available under Section 487 to impose individual liability upon any New York lawyer such as respondent Greig. However, the language of the statute does not impose monetary liability upon the State of New York or any of its agencies.

Respondent Greig also is subject to individual liability as a co-conspirator under *Dennis v. Sparks*, 449 U.S. 24, 31-32 (1980), along with the other respondents named as co-conspirators, who are subject to claims for personal liability as set forth in the Amended Verified Complaint (Pet.App. 196a-199a, 204a, 205a, 211a, 212a, 221a-224a, ¶¶ 80-82, 98, 100, 137, 139, 170).

As stated in *Dennis v. Sparks*:

> "... we agree with the Court of Appeals that the potential harm to the public from denying immunity to private co-conspirators is outweighed by the benefits of providing a remedy against those private persons who participate in subverting the judicial process and in so doing inflict injury on other persons."

Even if respondent Greig claims that he acted on behalf of the State of New York as an official, the disputed fact issues that the record raises invalidate the viability of any such claim (Pet.App. 64a-88a; 105a-125a; 126a-170a). In addition, the requests for injunctive relief asserted in the complaint (Pet.App. 171a) are not barred by the Eleventh Amendment in any event. As stated in *Dubuc v. Michigan Board of Law Examiners*, __ F.3d __, 2003 U.S. App. LEXIS 18153 [** 8] (6th Cir. Sept. 3, 2003):

> "To determine whether an entity is a state department or agency for purposes of the Eleventh Amendment, the primary issue is whether the state would ultimately be liable for any money judgment against the entity. *Brotherton v. Cleveland*, 173 F. 3d 552, 560-61 (6th Cir. 1999)."

The Sixth Circuit held in *Dubuc*, *supra*, that ". . . the individual defendants are not entitled to Eleventh Amendment immunity from this suit." (*Dubuc*, *supra*, 2003 U.S. App. LEXIS 18153 [** 12].)

Also applicable is *Nevada Dept. of H.R. v. Hibbs*, _ U.S. __; 155 L.Ed. 2d 953, 123 S.Ct. 1972 (May 27, 2003) (Pet.App. 7a, 10a), which holds that Eleventh Amendment immunity is not available to claims like those in this case that have been asserted under legislation enacted pursuant to Section 5 of the Fourteenth Amendment.

In addition, the waiver of the Eleventh Amendment immunity claims by New York Attorney General Spitzer is shown by his inconsistent reliance on the collateral estoppel defense in connection with the merits of the claims asserted against respondent Greig.

The recent decision by the New York Court of Appeals in *Jeffreys v. Dr. Griffin*, 2003 N.Y. LEXIS 3409 (Oct. 30, 2003), demonstrates the lack of merit of such defense.

The *Jeffreys* case holds that collateral estoppel does not apply to a patient (or client) in a subsequent civil action, such as in this case, "because the patient is not a `legally recognized party in interest," a doctrine that is applicable to petitioner concerning the Hearing Committee proceeding, where petitioner testified as a voluntary witness in the proceeding that was presided over by respondent Greig, because a person such as petitioner "enjoys no legal or practical opportunities to litigate civil law grievances within the framework of [the Hearing Committee's] proceeding."

In addition, under the decision in the *Jeffreys* case collateral estoppel is not available herein because there never was a full and fair hearing or "an opportunity to contest the identical issue" (92 NY 2d at [2003 N.Y. LEXIS 3409 * 12]), in that proceeding, since respondent Greig was so biased and prejudiced against petitioner he was unable to provide the requisites of due process. Moreover, in the subsequent proceeding in the district court that resulted in petitioner's being deprived of counsel as a result of the activities of respondent Greig and the New York Attorney General in causing petitioner's First Amendment rights to be effectively eviscerated, by causing her to be deprived of competent counsel to speak on her behalf regarding the complexities of her constitutional and civil rights claims, petitioner was deprived of even the pretense of a hearing. (Pet.App. 250a-255a; 89a, 158-160a.)

Because of the lack of a level playing field in which an army of lawyers have conspired to gang up on petitioner, a *pro se* litigant who is a woman, under the endorsement of the New

York Attorney General, the appointment of independent counsel to represent the petitioner for this purpose before this Court is respectfully requested in accordance with the procedure followed in *Gideon v. Wainwright, Corrections Director*, 372 U.S. 335, 9 L.Ed. 2d 799, 83 S.Ct. 792 (1963).

II. THE PETITION IS CERTWORTHY ALSO BECAUSE IT WILL REQUIRE NEW YORK ATTORNEY GENERAL SPITZER TO BREAK HIS SILENCE AND COME FORWARD WITH THE INSIDER INFORMATION THAT HE AND HIS CLIENT UNIQUELY POSSESS ABOUT THE CORRUPTION OF THE JUDICIAL ELECTION PROCESS IN NEW YORK

The record below shows that the New York Attorney General and his client respondent Greig became active co-participants in the scheme to retaliate against petitioner for opposing Greig's political skulduggery by causing irreparable and punitive injury to petitioner's civil rights including her free speech rights and her First Amendment right to protest and petition for a redress of grievances.

Not only was the New York Attorney General personally involved in the actions that caused petitioner to be deprived of counsel, but in addition he had a major conflict of interest as a result of his actions (Pet. 4-5, 9-11; Pet.App. 233a-236a, 247a-248a) in causing such drastic retaliatory punitive action to be taken against petitioner in the process of his representation of respondent Greig.

The public interest requires a response by New York Attorney General Spitzer to this petition because he is the possessor of extensive personal knowledge concerning both the

activities of his client Grieg as the fixer of political elections for New York State judicial candidates in New York County (Pet. 4-5, 7-8; Pet.App. 236a-245a, 204a-214a, 177a-178a), and also concerning the necessity for the disqualification of Judge Straub (Pet. 11-12, 14-15; Pet.App. 230a-239a) in connection with the actions of the Second Circuit (Pet. 5-6; Pet.App. 1a, 3a, 5a, 7a).

Such present personal knowledge on the part of Mr. Spitzer is indicated in the following news item in *AM New York*, a New York City Newspaper, dated November 4, 2003, p. 2, which reports that Spitzer "is looking to raise $2 million at a fundraising function next month" in connection with his plan to run for governor, according to his aides in Albany.

Certiorari therefore should be granted so that Attorney General Spitzer would be required at last to come forward and make known the extensive information of which he and his client possess concerning election fraud and the political skulduggery that has brought into disrepute the scandalous pattern or practice of the selling of judicial influence in New York County in return for political contributions or other favors. (Pet.App. 205a-211a, 239a, 241a-243a)

As the Attorney General of the State of New York, Eliot Spitzer has a public duty to come forward with such information that is within his own personal knowledge, especially since his own inside knowledge is at least as great as that of the insiders in the mutual fund industry that he is currently vigorously engaged in requiring the production of such information about the skulduggery that is apparently rampant in that industry.

The high degree of certworthiness involving the third question presented by the petition herein, namely, whether

Judge Straub of the Second Circuit was subject to mandatory disqualification pursuant to 28 U.S.C. § 455 (Pet.App. Pet. 5-6; Pet.App. 230a-239a) is indicated by the silence of New York Attorney General Eliot Spitzer on the issue. The undisclosed personal knowledge that both Mr. Spitzer and his client possess concerning this subject makes the Attorney General's silence on the issue akin to an obstruction of justice.

The public interest in the integrity and independence of the judicial function is such that the petition for a writ of certiorari should be granted so that Attorney General Spitzer, who is dependent upon the political levers of power possessed by his client, respondent Greig, in his bid for the governorship (Pet.App. 247a-248a), will produce the information that he possesses as a political insider who himself has and will profit extensively from the dispensation of the relationship between and the political contributions and favors of the activities of respondent Greig that to petitioner's own knowledge involve election fraud, and to withdraw from continuing to represent respondent Greig as a necessary witness, as he is required to do under the Code of Professional Responsibility.

Also relevant to the disqualification issue is the Second Circuit's decision in *United States v. John Doe*, 203 U.S. App. LEXIS 22105 (2d Cir. Oct. 29, 2003), issued just this week, which holds that a district judge was subject to mandatory disqualification because he appeared to have engaged in rubber-stamping [* 9] the recommendations of the U.S. Attorney on sentencing matters, citing *United States v. Campo*, 140 F.3d 415 (2d Cir. 1998).

The record on this appeal is that Judge Straub not only acted merely as a rubber-stamp based upon ex parte dealings with clerical personnel in the Second Circuit's office, as shown in the mandamus petition attached to the Petition Appendix at

225a, as shown at 226a, but also was subject to mandatory disqualification because his personal involvement in the promotion of partisan political interests concerning which Attorney General Spitzer and his client respondent Greig also had extensive personal involvement, as shown in the appendix to the petition at 234a-243a, making an *a fortiori* case for consideration of the applicability of the mandatory disqualification requirement.

CONCLUSION

The petition for a writ a certiorari should be granted and petitioner's request for the appointment of independent counsel should be considered and granted.

Dated: November 7, 2003

Respectfully submitted,

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